

**STATE OF NORTH DAKOTA**  
**BOARD OF ANIMAL HEALTH**

IN THE MATTER OF:	)	<b>RECOMMENDED</b>
	)	<b>FINDINGS OF FACT,</b>
Dave Hermanson	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
	)	
.....		

On December 26, 2000, an Administrative Complaint was filed with the Board of Animal Health by Assistant Attorney General Reid Brady requesting administrative action in the form of the imposition of a civil penalty against Dave Hermanson. The complaint cites as grounds for the administrative action N.D.C.C. § 36-14-04.1 and N.D. Admin. Code §§ 48-02-01-01 and 48-02-01-09, bringing or receiving a horse into North Dakota without a certificate of veterinary inspection and bringing or receiving a horse into North Dakota without a negative test for equine infectious anemia.

On January 30, 2001, the Board of Animal Health requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the complaint. On February 1, 2001, the undersigned ALJ was designated.

On February 1, 2001, the ALJ issued a Notice of Prehearing Conference. The prehearing conference was held as scheduled on February 13, 2001. On February 20, 2001, the ALJ issued a Prehearing Conference Summary and Notice of Hearing. The notice scheduled an April 9, 2001, administrative hearing. On March 21, 2001, the ALJ issued a Notice of Rescheduled Hearing. That notice rescheduled the hearing for April 23, 2001.

Prior to the hearing, the parties engaged in discovery and filed motions with the ALJ. On March 27, 2001, the ALJ issued an Order on Complainant's Motion to Compel Discovery. On April 4, 2001, the ALJ issued an Order on Respondent's Motion to Compel Discovery.

The hearing was held as rescheduled on April 23 in the Office of Administrative Hearings, Bismarck, North Dakota. Mr. Brady represented the Board at the hearing. Mr. Brady called one witness, Dr. Larry A. Schuler, the state veterinarian. The respondent, Dave Hermanson, was not present at the hearing. Ralph A. Vinje, attorney at law, Bismarck, represented Dave Hermanson at the hearing. Mr. Vinje called no witnesses at the hearing. Mr. Brady offered five exhibits at the hearing, all of which were admitted. Mr. Vinje offered two exhibits at the hearing. One was admitted. The other was not admitted but is included with the record under an offer of proof.

At the close of the evidentiary portion of the hearing, the ALJ heard oral argument from Mr. Brady and Mr. Vinje.

Based on the evidence presented at the hearing and the arguments made by counsel, the administrative law judge makes the following recommended findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. On September 17, 2000, Dave Hermanson purchased a palomino horse named Londo Hancock ("the horse") at the Sturgis Livestock Exchange in Sturgis, South Dakota,. Exhibits 1, 3, and 4.
2. Dave Hermanson brought or received the horse into North Dakota. Exhibits 2, 4, and 6.
3. On September 28, 2000, Dr. John C. Reifenberger of Midway Veterinary Clinic, Mandan, North Dakota ("the clinic"), certified that he drew a specimen from the horse for testing

for equine infectious anemia (“EIA”). Exhibit 6, test form VS FORM 10-11T (Oct 97). The specimen from the horse was received that same day at the clinic and the laboratory test was reported out of the clinic on September 29, 2000, by a lab technician. The test was negative for EIA. The test form states that the horse “is stabled” at the “Hermanson-Kist Horse Sale, Kist Livestock, Mandan, ND.” Exhibit 6. The test form lists the name of the owner of the horse as Dave Hermanson, Mandan, ND. *Id.* Exhibit 6 appears to show that when Dr. Reifenberger drew the EIA specimen from the horse, the horse was stabled at Kist Livestock in Mandan. Further, Exhibit 6 appears to show that the specimen from the horse was then brought back from Kist Livestock to the clinic that same day, and the test results were reported out the next day. It would appear that such a procedure occurring with the horse at another place, performed by Dr. Reifenberger, such as in another state, *e.g.*, South Dakota, with Dr. Reifenberger then returning to Mandan to have the specimen tested, on the same day, is unlikely to have occurred. The form gives no indication that the EIA specimen was obtained elsewhere. Neither Dave Hermanson nor Dr. Reifenberger testified at the hearing about the test form or location of the test. Again, Hermanson was not present at the hearing.

4. The laboratory that does the EIA testing for any horse is to file a copy of the test result indicated on the form with the state veterinarian. Exhibit 6 indicates that it is Part 3, the owner’s copy. Dr. Schuler did not make a search of the records in his office for an EIA test form on the horse, but he had not seen Exhibit 6 prior to the hearing.

5. The horse was offered for sale by the owner Dave Hermanson at the Hermanson-Kist All Breed Horse Sale at Kist Livestock in Mandan in October 2000 and again in March 2001. Exhibits 2 (catalog), 3 (addendum to catalog), and 5 (Catalog-Lot 403).

6. Although North Dakota was the state of destination of the horse, after its purchase in South Dakota, the North Dakota state veterinarian received no copy of a certificate of

veterinary inspection on the horse, as is the usual procedure after sales of horses at livestock markets. Also, although South Dakota was the state of origin of the horse, the South Dakota state veterinarian received no copy of a certificate of veterinary inspection on the horse, as is the usual procedure after sales of horses at livestock markets. Dr. Schuler made a search, or caused a search to be made, of the records for a copy of a certificate of veterinary inspection on the horse both at his office and at the South Dakota state veterinarian's office, and no certificate of veterinary inspection for the horse was found at either office. Besides the copies of the certificate of veterinary inspection that are to be provided to the state veterinarian both in the state of origin and the state of destination, a copy is to be provided to accompany the animal and a copy is to be provided to the livestock market.

7. There have been several outbreaks of EIA in the last year in North Dakota that have been associated with the imports of animals. EIA is a contagious and infectious disease that is a very serious matter for horse buyers and sellers. A horse can have the disease and it will not be apparent without doing testing to confirm its presence. The purpose of the test for EIA is to assure that a horse does not have EIA. The risk of spread of EIA is greater without testing for it. Contact with other animals increases the risk of the spread of EIA. In 1999, as the result of an EIA outbreak, the Board tested 700-800 animals for EIA and destroyed about 35 animals that were infected with EIA. EIA is considered to be a serious matter by the state veterinarian. Failure to test a horse for EIA prior to bringing it into the state is considered a serious matter by the state veterinarian

8. The purpose of a certificate of veterinary inspection is to verify that required testing has been done and that a clinical examination of the animal has been done so that there is proof that the animal has no clinical diseases, such as viral or bacterial infections or diseases that could spread to other animals. Many viral or bacterial infections or diseases, although generally

not fatal, are considered serious matters. Bringing an animal into the state without a certificate of veterinary inspection is considered a serious matter by the state veterinarian.

9. Exhibit 6 was not provided to the Board pursuant to the Board's formal discovery requests. On January 29, 2001, the Board issued its Complainant's Discovery Requests to Respondent. Part of that document includes requests for production. Request No. 3 states, "[p]lease produce a copy of each test result for equine infectious anemia for 'Londo Hancock' for each test that occurred within the twelve months prior to the date the horse was brought or received into North Dakota." Request No. 4 states,

"[p]lease produce a copy of each test result for equine infectious anemia for each horse brought or received into North Dakota between September 17, 2000, and October 8, 2000, inclusive, other than 'Londo Hancock,' for each test that occurred within the twelve months prior to the date each horse was brought or received into North Dakota."

Pursuant to the ALJ's Order on Complainant's Motion to Compel Discovery, issued March 27, 2001, the ALJ "ORDERED [Hermanson] to specifically respond to the Board's Interrogatories, Requests for Admissions, and Requests for Production ... within ten (10) days from the issuance of this order." The ALJ further said in that order that failure to comply with the order could result in a default order being entered against Hermanson or appropriate action under N.D. Admin. Code § 98-02-02-06 (sanctions for failure to comply with discovery).

10. If the test performed on the horse for EIA was performed out-of-state, within the twelve months prior to being brought or received into North Dakota, failure to provide Exhibit 6 to the Board prior to the hearing was noncompliance with the ALJ's March 27, 2001, order. If the test performed on the horse for EIA was performed in North Dakota, as it appears from Exhibit 6, then failure to provide Exhibit 6 to the Board prior to the hearing is not noncompliance with the ALJ's March 27, 2001, order. Counsel for Hermanson did not specifically say at the hearing that Exhibit 6 is evidence that the EIA test on the horse was done elsewhere than in

North Dakota. Yet, his questions of Dr. Schuler implied that the EIA test could have been done elsewhere. If he believes that the testing for EIA done on the horse was done outside North Dakota before the horse was brought into North Dakota and stabled at Kist Livestock, counsel should have provided Exhibit 6 to the Board pursuant to the ALJ's March 27, 2001, order. However, the ALJ believes that Exhibit 6 shows that the EIA test was completed on the horse after it had entered North Dakota and after it was already stabled at Kist Livestock. Therefore Hermanson was not in violation of the ALJ's March 27, 2001, order.

### **CONCLUSIONS OF LAW**

1. N.D.C.C. §§ 36-01-00.1 and 36-14-04.1(1) require that a horse sold at an out-of-state livestock market, brought or received into North Dakota, must be accompanied by a certificate of veterinary inspection certifying that the animal is free from symptoms of all contagious and infectious diseases, and that the animal meets disease testing and vaccination requirements prescribed by rule. *See* N.D. Admin. Code § 48-02-01-01.

2. N.D. Admin. Code § 48-02-01-09 requires that a horse have a negative test for EIA within twelve months prior to the date of its importation into North Dakota.

3. The evidence at the hearing shows, by the greater weight of the evidence, that the horse was brought or received into North Dakota by Dave Hermanson and was not accompanied by a certificate of veterinary inspection in violation of N.D.C.C. § 36-14-04.1(1).

4. The evidence at the hearing shows, by the greater weight of the evidence, that the horse was brought or received into North Dakota by Dave Hermanson when the horse had not had a negative test for EIA within twelve months prior to being brought or received into North Dakota, in violation of N.D. Admin. Code § 48-02-01-09.

5. N.D.C.C. § 36-14-21(2) authorizes the Board to assess a civil penalty of up to five thousand dollars (\$5,000) against Dave Hermanson for each violation of N.D.C.C. § 36-14-04.1(1), or N.D. Admin. Code § 48-02-01-09.

**RECOMMENDED ORDER**

The greater weight of the evidence shows that Dave Hermanson violated the provisions of N.D.C.C. § 36-14-04.1(1) and N.D. Admin. Code § 48-02-01-09. The Board in its Administrative Complaint asks for the imposition of a \$5,000 civil penalty against Dave Hermanson as a result of the alleged violations. The violations were proven at the hearing. The violations are serious violations. IT IS ORDERED that Dave Hermanson is assessed a civil penalty of \$5,000 as a result of the violations proven.

Dated at Bismarck, North Dakota, this 27th day of April 2001.

State of North Dakota  
Board of Animal Health

By: \_\_\_\_\_  
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